Supreme Court, U.S.
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No. 09-1323

In The

Supreme Court of the United States

PETER GOTTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should the lower courts have vacated Gotti's conviction under 28 U.S.C. § 2255, for the prosecutions' violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny by not disclosing material and favorable evidence, including Arizona state wiretaps of it's expert witness colluding with the target of the charged murder conspiracy?

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

Other than Petitioner Peter Gotti and Respondent United States of America, there were no other parties to the proceedings in the Court of Appeals. The parties have no parent or subsidiary companies and do not issue stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 14.1(b) & 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
JURISDICTION	1
LEGAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. THE TRIAL	2
B. THE DIRECT APPEAL	4
C. THE § 2255 PROCEEDINGS	4
REASON FOR GRANTING THE PETITION	11
BRADY V. MARYLAND AND PROGENY REQUIRED DISCLOSURE OF THE MOUW RECORDINGS AND OTHER FAVORABLE EVIDENCE DERIVED FROM THE ARIZONA	

ECSTASY INVESTIGATION, SINCE THE GOVERNMENT KNEW OF THE INVESTIGATION AND HAD PROSECUTED GRAVANO ON THE ECSTASY CHARGES IN A NEIGHBORING DISTRICT SHORTLY BEFORE GOTTI'S TRIAL

CONCLUSION 13

TABLE OF AUTHORITIES

	Page
Cases	
Banks v. Dretke, 540 U.S. 668 (2004)	11
Brady v. Maryland, 373 U.S. 83 (1963)	Passim
Cone v. Bell, __ U.S. __, 129 S.Ct. 1769 (2009)	11
Gotti v. United States, U.S.C.A. No. 09-3824 (2d Cir. January 25, 2010)	1
Gotti v. United States, 08 Civ. 7178 (HB) (S.D.N.Y. August 3, 2009)	1
Gotti v. United States, 2009 WL 1010498 (S.D.N.Y. April 15, 2009)	1
Kyles v. Whitley, 514 U.S. 419 (1995)	Passim
Strickler v. Greene, 527 U.S. 263 (1999)	12
United States v. Bagley, 473 U.S. 667 (1985)	11
United States v. William Cutolo, et. al., 93-cr-1230 (EHN)	13
United States v. Gravano, 1:01-cr-00042-AR	7
United States v. Matera, 489 F.3d 115 (2d Cir. 2007)	4
United States v. Alphonse Persico, 92-cr-351 (DGT) (E.D.N.Y.)	13
Statutes	
18 U.S.C. § 1962(c) and (d)	2
18 U.S.C. § 3500	5

28 U.S.C. § 1254(1)	1
28 U.S.C. § 2255	Passim
Rules	
Fed. R. Civ. Pro. 59(e)	10

TABLE OF APPENDICES

Gotti v. United States, 2009 WL 1010498 (S.D.N.Y. April 15, 2009) A-1

Gotti v. United States, 08 Civ. 7178 (HB) (S.D.N.Y. August 3, 2009) A-22

Gotti v. United States, U.S.C.A. No. 09-3824 (2d Cir. January 25, 2010) A-27

OPINIONS BELOW

The District Court's opinion denying Mr. Gotti's motion to vacate his conviction under 28 U.S.C. § 2255 is reported at *Gotti v. United States*, No. 08 Civ. 7178 (HB), 2009 WL 1010498 (S.D.N.Y. Apr. 15, 2009). The affirmance of the court of appeals is reported at *Gotti v. United States*, U.S.C.A. No. 09-3824 (2d Cir. January 25, 2010). Both opinions are reproduced in the appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

In *Brady v. Maryland*, this Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), this Court extended *Brady*, holding that "[T]he individual prosecutor in each case has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."

STATEMENT OF THE CASE

Peter Gotti was convicted after a jury trial of conspiracy to violate and substantive violation of the Racketeering Influenced and Corrupt Organization ("RICO") Act, 18 U.S.C. §§ 1962(c) & (d). The Government alleged that Gotti was a member, captain, and for a time the boss of the "Gambino Crime Family" of "La Cosa Nostra" ('LCN"). Only two RICO predicate acts were charged. The first alleged a 2000-01 conspiracy to murder Gambino Family underboss-turned-informant Salvatore "Sammy the Bull" Gravano. The second alleged extortion of the construction industry in New York City.

A. THE TRIAL

At trial, the Government presented its case through expert witness testimony about the Gambino Crime Family enterprise, informant testimony, and audio recordings of Gotti's 1996 social visits with his brother, John Gotti, who was serving a life sentence at the United States Penitentiary in Marion, Illinois.

The prosecution called former Federal Bureau of Investigation ("FBI") Supervisory Special Agent ("SSA") Bruce Mouw as an expert witness regarding the Gambino Crime Family, its structure, and "rules." Mouw had previously supervised the FBI's "Gambino Squad." He had also served as Gravano's handler when he became a cooperating witness. Unknown to the defense at the time was the fact that he maintained an intimate relationship with

Gravano up to the moment of Gravano's arrest on ecstasy charges in 2001.

Former Gambino Captain Michael DiLeonardo testified to Gotti's involvement in construction industry extortion, including his membership on a construction committee within the Gambino Family. DiLeonardo also testified to having heard Gotti at one meeting complaining that he had fruitlessly expended money on the unsuccessful effort to kill Gravano.

Gambino associate Salvatore Mangiavillano testified about his trip to Arizona to kill Gravano, under the supervision of Thomas "Huck" Carbonaro, a Gambino member who was formerly in Salvatore Gravano's "Crew." Carbonaro was Gotti's sole co-defendant at trial, and was charged with additional predicate acts of murder. Mangiavillano testified to the places he and Carbonaro stayed, and their efforts to track and kill Gravano. Mangiavillano claimed that Carbonaro had told him that the order came from the "top" of the Gambino Family, which he believed to be Peter Gotti. He never received any instructions from Gotti, whom he did not know.

Over objection, the Government also introduced audio recordings of Peter Gotti visiting with his incarcerated younger bother, John Gotti, at USP Marion. During the course of one recording, which pre-dated the Gravano conspiracy alleged against Peter by five years, John Gotti refers to Gravano as "a bill that's gotta be paid." Peter Gotti did not reply. The recordings were used as evidence of Gotti's alleged motive to kill Gravano in furtherance of the Gambino Family enterprise.

The jury deliberated over the course of two days. The evidence was far from strong. The jury's final note asked the Court whether, if it acquitted as to one predicate act, it had to acquit as to the RICO. Shortly after the Court responded affirmatively, the jury convicted. The following day, a juror sought to recant his verdict. Then the jury rendered a sentencing verdict, finding proposed enhancements for leadership unproven and the extortion to have involved a fraction of the loss alleged.

B. THE DIRECT APPEAL

The United States Court of Appeals for the Second Circuit affirmed the District Court. *See United States v. Matera*, 489 F.3d 115 (2d Cir. 2007)

C. THE § 2255 PROCEEDINGS

Post-appeal, Gotti uncovered materials that were ordered unsealed in 2007 by a New Jersey State court in an unrelated proceeding. It was only then that he learned that during the course of an Arizona State Police investigation into Sammy Gravano's ecstasy trafficking, prosecution expert witness and retired FBI SSA Bruce Mouw had been intercepted speaking with Gravano during the time of the alleged plot by Peter Gotti to kill him. Further, the conversations appeared to reflect the two speaking about previous jointly conducted criminal activity and their current collusion to "get their stories straight." Another time, Gravano tells Mouw, "we've

come together this far, don't start buttoning up on me now."

Also obtained were intercepted conversations between Gravano and former Gambino member-turned cooperator Dominick Borghese, which showed that Borghese knew Gravano's telephone number and physical location. Although Borghese was initially slated to testify against Mr. Gotti and § 3500 materials were produced, the intercepted Gravano-Borghese conversations were never disclosed and Borghese was ultimately not called as a witness.

The New Jersey State unsealing order also revealed that, given the Phoenix Police Department's ("PPD") institutional distrust of the agency on issues pertaining to Gravano, it had "tried to keep their investigation of Gravano confidential from the FBI." A Bergen County Prosecutor's Office memorandum noted that, despite the PPD's best efforts:

> Two days prior to them taking their case down a member of their department leaked it to an FBI agent in Phoenix, who in turn promptly provided the information to FBI headquarters. Through cooperating defendants, they learned that someone in the FBI informed Gravano of the Phoenix case and of his impending arrest, and Gravano promptly had his associates stop using their phones and destroy crucial evidence of the drug operation prior to the take down of the case. Thus, this reinforces the decision and need to

> maintain confidentiality on our part until our investigation is complete.

Evidence of this collusion between the FBI and Gravano, which facilitated the wholesale destruction of evidence and distortion of truth in a criminal proceeding, was never disclosed to Gotti.

Also newly discovered was the evidence that during the same period as Gotti's alleged conspiracy, Gravano solicited an associate named Dominick Sirico to kill his brother-in-law, Edward Garafola, for $20,000.00. Garafola was originally Gotti's co-defendant. Prosecutors maintained, without disclosing the existence of a Gravano contract against only Garafola, that he conspired with Gotti and Thomas Carbonaro to kill Gravano. Gravano also purportedly offered to kill two witnesses in the Phoenix area for Sirico if he assisted in killing Garafola. Gravano also told Sirico that he "never intended to become a law abiding citizen," and would "never leave the life."

It was also learned that during the conspiracy charged against Gotti, Gravano told a criminal associate, Philip Pascucci, that he "had used the feds to get his deal" and "was 'still in bed' with them in an effort to use them to his advantage while continuing his criminal enterprise." Pascucci told the Bergen County Prosecutors' Investigators that Gravano was concerned that the government would "tie another body to him" and "his relationship with the feds would be over." Gravano allegedly did not confess to every murder he committed because "there were

others involved with him on those murders that he did not want to rat on."

Federal prosecutors and the FBI knew of this evidence before Mr. Gotti's trial in November 2004, or should have, since Gravano was prosecuted for ecstasy violations in the Eastern District of New York subsequent to the wiretap investigation's conclusion and Gotti's alleged conspiracy, in 2001. *See United States v. Gravano*, 1:01-cr-00042-AR. Notwithstanding prosecutors' representations that they were "aware of their *Brady* obligations," and the impeaching value of these specific materials, they were never disclosed. Dominick Borghese was not called as a witness despite § 3500 material having been produced. Mouw's direct testimony was studiously designed to avoid reference to his relationship with Gravano—or its intimacy—during the period of the offenses charged. Nor was any information regarding other alleged plots to kill Gravano disclosed.

Accordingly, Gotti moved under 28 U.S.C. § 2255 to vacate his conviction and for a new trial. He argued that the evidence at trial was not strong, and the withheld evidence undermined confidence in the outcome. The Gravano conspiracy was not charged substantively, but only as a racketeering predicate act. Jurors' last note before conviction asked in pertinent part, "if it were to happen that the jury unanimously agreed that one act was proved and the other act was not proved, what would be the correct verdict for that count?" (Tr. 3807). Shortly after the district court informed the jury that it would indeed have to acquit of RICO under those circumstances

(Tr. 3813), they returned from their deliberations with a guilty verdict. (Tr. 3819).

The next day, a juror unsuccessfully sought to recant his verdict. The jury then heard sentencing arguments, finding Gotti's leadership not proven and the extortion count to have involved only between one and two and a half million dollars. The record regarding the *charged predicate acts*—not merely the Gambino "enterprise evidence"—was not compelling and the verdict was narrowly obtained.

Mr. Gotti argued that, if he had possessed the recordings of Gravano and Mouw and Borghese, and the other favorable evidence adduced during the Arizona investigation, such as that reflecting Gravano's living openly and communicating with various prior criminal associates, he could have attacked the credibility of the FBI, and particularly the lead agent who had handled Gravano. He could have shown a degree of complicity and collusion between Mouw and Gravano that would have undermined Mouw as an expert witness, and established Mouw and the FBI's bias and motive to fabricate for Gravano. Mr. Gotti also could have asserted that Borghese was able to communicate freely with Gravano, whose location was far from the secret that the prosecutors asserted it was at trial. He could also have presented a defense with support in actual evidence rather than mere speculation that Carbonaro and Mangiavillano were, like Borghese and numerous others, in Arizona merely to pursue joint criminal activities with Gravano.

Mr. Gotti could also have effectively questioned the integrity of the FBI, through evidence

of the FBI's continued relationship with Gravano, including improper disclosure of criminal investigations, collusion to "get the story straight," and tipping Gravano off to his own pending wiretap investigation—during the same time that Gotti was alleged to have been conspiring to kill him. The unsealed New Jersey State materials also revealed Gravano's belief that there existed unrelated contracts to murder him before Gotti's alleged conspiracy began. This evidence was also materially favorable to Gotti, who could have used it to argue that there existed reasons other than him or the Gambino Family for Mangiavillano and Carbonaro to be looking for Gravano. Despite the materiality of this evidence, it was studiously hidden from Gotti during his prosecution and trial.

The prosecutors' trial claims that only Carbonaro and scant few others could have known Gravano's location, since the two men's wives still communicated, would have been substantially undercut. Evidence of Gravano's continued association with criminals he had met while in the witness security program and of his newly flourishing criminal enterprise would have provided additional support for this line of defense.

Had the evidence been disclosed, Gotti could have also made informed decisions whether to call hostile witnesses like Dominick Borghese, Gravano, and the other confidential informants who made adverse attributions to Gravano.

Despite these facts, the district court denied Gotti's § 2255 petition, finding that he had procedurally defaulted, essentially by not speculating

pre-trial or on direct appeal that Mouw must have been among those intercepted speaking with Gravano, let alone in a way that was impeaching or favorable, and that in any event Gotti's arguments were without merit. The court found that although the prosecution had heard reports in the media of the Gravano recordings pre-trial, the evidence sought would not have affected the outcome and that Gotti suffered no prejudice. The court declined to issue a certificate of appealability. Gotti then unsuccessfully moved the court to reconsider its opinion pursuant to Fed. R. Civ. Pro. 59(e).

Gotti appealed the denial of his § 2255 petition. On January 25, 2010, the Second Circuit affirmed the district court in all respects, also declining to issue a certificate of appealability.

REASONS FOR GRANTING THE PETITION

I. *BRADY V. MARYLAND* AND PROGENY REQUIRED DISCLOSURE OF THE MOUW RECORDINGS AND OTHER FAVORABLE EVIDENCE DERIVED FROM THE ARIZONA ECSTASY INVESTIGATION, SINCE THE GOVERNMENT KNEW OF THE INVESTIGATION AND HAD PROSECUTED GRAVANO ON THE ECSTASY CHARGES IN A NEIGHBORING DISTRICT SHORTLY BEFORE GOTTI'S TRIAL

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that when the prosecution suppresses evidence that is favorable to a defendant that is material to guilt or punishment, the defendant has been denied due process "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Court defined evidence as "material" under *Brady* where there is a reasonable probability that if the evidence had been disclosed, the outcome would have been different. Favorable evidence must be disclosed where it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 5124 U.S. 419, 435 (1995); *accord, Cone v. Bell*, __ U.S. __, 129 S.Ct. 1769, 1783 (2009); *Banks v. Dretke*, 540 U.S. 668, 698-699 (2004).

Kyles v. Whitley, 514 U.S. 419, 436 (1995) instructs that the effect of any *Brady* violations should be "considered collectively, not item by item." *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) restates *Kyles'* holding that prosecutors have an affirmative duty "to learn of any favorable evidence known to others acting on the government's behalf...including the police."

Here, Gotti's trial prosecutors failed in their affirmative duty to learn of *Brady* materials and disclose them. Federal prosecutors in the Eastern District of New York had prosecuted Gravano for ecstasy violations stemming from his Arizona activities before Gotti's trial in the Southern District of New York. The Southern District has conceded having known of the Gravano investigation and wiretaps before Gotti's trial, yet disavows specific knowledge of the Mouw or Borghese recordings, or of any of the other undisclosed favorable or impeaching items identified by Gotti.

The district court, although noting that the prosecutors' conceded knowledge of the wiretap would otherwise be troubling, ignored the cumulative effect of the undisclosed evidence to conclude that it was immaterial, Gotti suffered no prejudice, and had not shown denial of a constitutional right so as to warrant a certificate of appealability. The Second Circuit affirmed the decision in less than one page.

These decisions appear to stand the *Brady* doctrine on its head to secure a conviction against a notorious, marquee-named defendant. Contrary to the district court's findings of immateriality, deploying the type of impeachment evidence

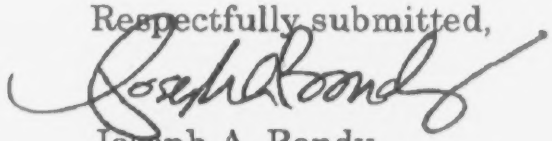
identified, particularly as to an FBI Supervisory Special Agent's seemingly criminal relationship with an informant, has a demonstrated history of success in organized crime cases. *See, e.g., United States v. Alphonse Persico*, 92-cr-351 (DGT) (EDNY) (trial acquittal of alleged crime family head charged with RICO and murder); *United States v. William Cutolo, et. al.*, 93-cr-1230 (EHN) (seven trial acquittals for RICO and murder conspiracy defendants).

For these reasons, it is respectfully requested that the Court grant Mr. Gotti's petition and order briefing on the merits.

CONCLUSION

Gotti's conviction should be reversed. The matter should be remanded to the District Court for a new trial.

Respectfully submitted,



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April 25, 2010

Appendix

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PETER GOTTI,

08 Civ. 7178 (HB)

Petitioner,

OPINION & ORDER

-Against-

UNITED STATES,

Respondent.
----------X

Hon. Harold Baer, Jr., District Judge:

Peter Gotti ("Petitioner") petitions this Court, pursuant to 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence. Petitioner claims that (1) the Government impermissibly suppressed favorable evidence that was material to the jury's finding of guilt; (2) the trial judge inadequately investigated a juror's attempt to recant his vote of guilty after the verdict was rendered; and (3) the holding in the United States Supreme Court's recent decision in United States v. Santos, 128 S.Ct. 2020 (2008), has invalidated a previous conviction that formed the basis of the jury's verdict and the Court's sentence. For the reasons that follow, the petition is denied.

I. BACKGROUND1

At Petitioner's trial, the Government's evidence included extensive proof of the nature and

structure of the Gambino Organized Crime Family, a project of the FBI at least since Robert Kennedy was Attorney General. The Gambino Family had been headed by Petitioner's brother, John Gotti Sr., until the latter was convicted and imprisoned, in part through the testimony of the former Family Underboss Salvatore Gravano. At the trial of the Petitioner, several other members of the Gambino Family also cooperated and testified for the Government. Their testimony, among other things, established that after the conviction of John Gotti Sr., the family and its criminal endeavors was directed by a Ruling Panel. The panel included Petitioner, who shortly assumed the role of Acting Boss.

[FN 1] This account of the facts underlying Petitioner's trial and conviction are taken from Petitioner's motion to vacate his sentence, the Government's response and accompanying affidavit, and the Second Circuit's account of the facts on Petitioner's appeal of his conviction, *United States v. Matera*, 489 F.3d 115, 119-20 (2d Cir. 2007).

[2]
The cooperators further testified that when Petitioner visited John Gotti Sr. in prison in 1996, the latter urged his brother to kill Gravano, and complained that Gravano's testimony had crippled the family and was "a bill that's gotta be paid." Petitioner ordered two family members– Thomas Carbonaro and Eddie Garafola – to kill Gravano, whose location had been disclosed in a newspaper article. Over the course of several

months, Petitioner provided approximately $70,000 for elaborate preparations for the murder, including surveillance, travel to Arizona, assumption of disguises, and equipment expenses. However, before the two would-be assassins could complete their assignment, their plan was foiled when Arizona police arrested Gravano and charged him with distribution of a controlled substance. At Petitioner's trial, the Government substantiated the plot to murder Gravano with hotel receipts, false identification documents, surveillance, and travel manifests related to the two would-be assassins' numerous "stake-out" missions to Arizona.

At Petitioner's trial, FBI Special Agent Bruce Mouw, who oversaw Gravano's protective detention in Arizona, testified about Gambino Family personnel and activities. Mouw testified to the existence of a criminal enterprise. He identified individuals, described FBI procedures, and authenticated union records. Petitioner later learned that, as a part of its drug investigation into Gravano's drug distribution, the Phoenix police had recorded conversations between Mouw and Gravano (the "Mouw-Gravano tapes"). In these recordings, Mouw informed Gravano about Bosco Radonjich, a leader of another criminal organization. Gravano reciprocated by informing Mouw about the FBI's investigation of their prior conversations. Gravano stated that they "better get our stories straight." However, these recordings, which Petitioner now claims contained exculpatory evidence, were not introduced at Petitioner's trial, nor were they turned over as Brady material as Petitioner urges was

appropriate. The Government opines that while the existence of the Phoenix police department's wiretaps had appeared in the media and was therefore known to the public, none of the Assistant United States Attorneys or FBI agents that worked on Petitioner's case possessed the recordings at the time of trial. Affidavit of Elie Honig ("Honig Aff.") at ¶ 6.

In addition to the testimony surrounding the plot to kill Gravano orchestrated by the Petitioner, two members of the Gambino Family testified that Petitioner was a member of the Construction Panel, which was made up of ranking Gambino family members and allowed its members to extort money and "cushy" no-work jobs from construction companies, and allowed [3] construction companies to hire non-union workers and pay non-union wages without trouble from the unions. The Gambino Family witnesses testified that the Construction Panel extorted tens of millions of dollars in this manner. The witnesses further testified to Petitioner's personal participation and extortion in the construction industry through his role on the Panel.

Petitioner was convicted of racketeering, conspiracy to racketeer, conspiracy to murder, and extortion and was sentenced to 25 years in prison, 3 years of supervised release, and a $400 special assessment. On the day after the jury convicted Petitioner, but before the Court passed sentence, Petitioner claimed that one juror, "Juror Seven," attempted to recant his guilty verdict. Judge Casey, who presided over the trial, interviewed the juror in the presence of the attorneys, but determined that an

evidentiary hearing was not necessary. No further inquiry was conducted regarding Juror Seven's alleged attempt to recant.

Following his conviction, Gotti appealed to the Court of Appeals for the Second Circuit, in which he raised numerous arguments, including challenges to the receipt in evidence of uncharged crimes, expert testimony, and recordings of jailhouse conversations; challenges to the constitutionality and reasonableness of his sentence; and challenges relating to the venue of the prosecutions and to the allegedly ineffective assistance of his counsel. See *United States v. Matera*, 489 F.3d 115, 118-25 (2d Cir. 2007). On May 30, 2007, the Second Circuit denied all of Petitioner's claims and affirmed the judgment of the District Court. *Id.* Subsequently, the United States Supreme Court denied his petition for certiorari. *Matera v. United States*, 128 S.Ct. 424 (2007).

II. STANDARD OF REVIEW

The court will grant a petition for habeas corpus under 28 U.S.C. § 2255, only if (1) the Petitioner's sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; or (3) the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. *See Woodard v. United States*, No. 04 Civ. 9695, 2005 U.S. Dist. LEXIS 26802, at *6 (S.D.N.Y. Nov. 8, 2005) (citing *Johnson v. United States*, 313 F.3d 815, 817 (2d Cir. 2002)); *see also*

United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995) ("[A] collateral attack on a final judgment in a federal criminal case is generally available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice'") (*quoting Hill v. United [4] States*, 368 U.S. 424, 428 (1962)). On a petition for habeas corpus, the petitioner bears the burden to prove his allegations by a preponderance of the evidence. *Whitaker v. Meachum*, 123 F.3d 714, 716 (2d Cir. 1997) (*citing, inter alia, Walker v. Johnston*, 312 U.S. 275, 286 (1941)); *see also United States v. Frady*, 456 U.S. 152, 166 (1982), *reh'g denied*, 456 U.S. 1001 ("We reaffirm the well-settled principle that to obtain collateral relief [under § 2255] a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

III. DISCUSSION

A. Each of Petitioner's Claims is Procedurally Barred.

As noted above, Petitioner raises three distinct grounds as collateral challenges to his sentence: (1) failure to produce allegedly exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) failure to conduct an evidentiary hearing following a juror's attempted recantation of a vote of guilty; and (3) the violation by the Government of the prohibition against the use of a previous conviction in

the wake of United States v. Santos, 128 S.Ct. 2020 (2008).

At the outset, it appears that each of Petitioner's claims is procedurally barred. It is well settled that a petition for habeas corpus may not provide a second bite at the apple, i.e., another chance to raise issues that were or could have been raised on appeal. *E.g., Frady*, 456 U.S. at 165 ("[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal.") (collecting cases). Where a defendant has failed to raise a matter on appeal, the claim may be raised on a habeas petition only if the defendant can first demonstrate either (1) cause and actual prejudice, or (2) actual innocence. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-51 (2006); *Bousley v. United States*, 523 U.S. 614, 622 (1998); *Frady*, 456 U.S. at 167-68. To determine what constitutes "cause" in this context, the U.S. Supreme Court consistently has held that, "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . ., [there is] no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Coleman v. Thomson*, 501 U.S. 722, 752 (1991), *reh'g denied*, 501 U.S. 1277; *id. at* 752 ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation and petitioner must bear the risk of attorney error.") (internal quotation and citation omitted); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("[W]e think that the existence of cause for a [5] procedural default must ordinarily turn on

whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts. . . .").

In this case, each of the claims Petitioner now raises on collateral review was available to him at trial and on appeal, yet he failed to raise them either to this Court or on appeal.

1. Claims Regarding the Mouw-Gravano Tapes

First, Petitioner had actual, or constructive, knowledge of the Mouw-Gravano tapes at least as of the time of his trial in late 2004, because there had been news accounts recounting the fact that the Phoenix police department had made recordings during their investigation of Gravano's drug distribution activities. Neither before nor during trial did Petitioner request the Government to turn over the Mouw-Gravano tapes, nor on appeal did he argue, nor could he, that failure to do so constituted a Brady violation. Petitioner fails to explain why he did not pursue the tapes or raise the issue earlier. More importantly, no argument is made as to how he may have been prejudiced by not having access to the tapes at trial. Therefore, Petitioner has failed to overcome the procedural bar to his claim concerning the Mouw-Gravano tapes.

2. Claims Regarding Juror 7

Petitioner was obviously aware of Juror Seven's attempted recantation, but failed to raise the issue in the Second Circuit on appeal. Petitioner

certainly had notice of the claim since December 24, 2004 – the day after the guilty verdict was rendered, long before any appeal. Thus, the argument was available on appeal, but not raised. Once again, Petitioner has not shouldered his burden to establish cause for his failure to raise the issue in the Second Circuit. Therefore, Petitioner's second claim for relief is similarly procedurally barred.

3. Claims Regarding the Santos Decision

Finally, Petitioner claims that the U.S. Supreme Court's recent decision in *United States v. Santos*, 128 S.Ct. 2020 (2008), decided after Petitioner's appeal to the Second Circuit was decided, applies retroactively and invalidates his 2003 conviction for money laundering under 18 U.S.C. § 1956 in the Eastern District and thus his petition must be granted and his present sentence and conviction in this Court be set aside. In *Santos*, the Supreme Court addressed the definition of the term "proceeds" in the federal money laundering statute when applied to an illegal gambling operation. The statute [6] proscribes, inter alia, conducting "a financial transaction which in fact involves the proceeds of specified unlawful activity . . . ." 18 U.S.C. § 1956(a)(1) (emphasis added). A plurality of four justices found that "proceeds" always means "profits." *Santos*, 128 S.Ct. at 2025. Justice Scalia, writing for the plurality, opined that there was nothing in the statute to indicate whether "proceeds," indicated "profits" or "gross receipts." Therefore, the Court applied "the rule of lenity," and

wrote, "ambiguous criminal laws [must be] interpreted in favor of the defendants subjected to them." *Id.* The plurality therefore adopted the "defendant friendly" approach that the statute forbids only laundering of profits, as opposed to gross receipts. *Id.* Justice Stevens concurred in the result, and provided the necessary fifth vote, but concluded that "proceeds" only necessarily meant "profits" in the context of an illegal gambling enterprise. Specifically, Justice Stevens found that "[t]he revenue generated by a gambling business that is used to pay the essential expenses of operating that business is not 'proceeds' within the meaning of the money laundering statute." *Id.* at 2033 (Stevens, J., concurring). In concluding that the meaning of "proceeds" depends on the context of the statute's application, as Justice Stevens did, he took issue with the plurality's finding that "proceeds" always meant "profits." *Id.*

Although *Santos* was decided after Petitioner's trial, and the decision on his appeal, and there is no indication in the opinion that it is to have retroactive effect,2 the fact is the argument with regard to the meaning of the statutory language under *Santos* was available to him on appeal. Put another way, when an appellant defaults by failing to raise a claim on appeal, "the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." *Johal v. United States*, C08-1075-RSL-BAT, 2009 WL 210709, at *6-8 (W.D. Wash. Jan. 28, 2009) (quoting *Smith v. Murray*, 477 U.S. 527, 537 (1986)). In this case, at

the time of Petitioner's appeal, several other

[Fn 2] The U.S. Supreme Court has held that a new rule of law does not apply retroactively unless the Court expressly holds that it so applies. *Tyler v. Cain*, 533 U.S. 656, 662 (2001); *see also Forbes v. United States*, 262 F.3d 143, 145 (2d Cir. 2001). Moreover, the few cases that have addressed the specific question of whether the plurality's decision in *Santos* is to be retroactively applied have expressly found that it is not. *See, e.g., United States v. Iacaboni*, No. 01-CR-30025-MAP, 2009 WL 70055, at *2 (D. Mass. Jan. 8, 2009) (stating that neither the Supreme Court nor the First Circuit has held that Santos applies retroactively); *United States v. Pryce*, No. CV 08-4456 PA, 2008 WL 2945449, at *3 (C.D. Cal. Nov. 6, 2008) ("[T]he United States Supreme Court has not held that *Santos* applies retroactively on collateral review."); *Vaughan v. United States*, 08CV330-T-02, 2008 WL 2945449, at *3 (W.D.N.C. July 25, 2008) ("[T]he Supreme Court did not rule that its holding [in *Santos*] could be retroactively applied in collateral proceedings or otherwise.").

[7] courts had decided the precise issue regarding the meaning of "proceeds" under § 1956 that the Supreme Court ultimately would decide in *Santos*. *See, e.g., United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005); *United States v. Grasso*, 381 F.3d 160, 167 (3d Cir. 2004), *vacated and remanded on other grounds*, 544 U.S. 945 (2005); *United States v. Iacaboni*, 363 F.3d 1, 5-6 (1st Cir. 2005); *United States v. Scialabba*, 282 F.3d 475, 478 (7th Cir.

2002); *see also Johal*, 2009 WL 210709, at *8-9 (discussing pre-*Santos* cases addressing the definition of the word "proceeds" under § 1956(a)(1)). "Indeed at the time of [Petitioner's appeal], the Federal Reporters were replete with cases involving" the very same challenge as that which was at issue in *Santos*, *see Bousley*, 523 U.S. at 622, and yet the issue was never raised either below or on appeal.

In sum, each of the arguments Petitioner brings on the instant habeas petition was available to him at the time of his appeal, but he chose not to raise them and he has shown no reason for that failure on this petition. Consequently, there is no need to address whether there is actual prejudice sufficient to overcome the procedural bar. As Petitioner also has not argued that he is actually innocent, the Court finds that all of his claims on this petition are procedurally barred. However, in accordance with this Circuit's preference for adjudicating claims on the merits, this Court further finds, as detailed below, that even if Petitioner was not procedurally barred from raising these claims, they lack merit. *See Gotti v. United States*, 08-CV-2664, 2009 WL 197132, at *1 (E.D.N.Y. Jan. 28, 2009).

B. Petitioner's Substantive Claims Have No Merit.

1. Claims Regarding the Mouw-Gravano Tapes

Petitioner claims that the Government impermissibly suppressed tape recordings that could have been used to exculpate him or to impeach

Mouw's testimony. He claims that he learned of the recordings in 2007 and that, had they been available to him at trial, he could have used them to "undermine the integrity of the FBI, . . . establish[] Mouw's bias and motive to fabricate for Gravano, . . . [or] ma[ke] informed decisions regarding calling potentially hostile witnesses." Pet. at 11-12. The Government counters that it did not violate *Brady*'s disclosure requirements, because it did not possess the tapes or know the contents of the recordings. The Government also asserts that the tapes' purported usefulness does not convey a reasonable likelihood of a different result. *See* Memorandum of Law of the United States of America in Opposition to Defendant's Motion to Vacate ("Opp.") at 16-17. [8]

In *Brady v. Maryland*, the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Second Circuit has interpreted Brady to require the defendant, in order to prevail, to show two things: "(1) that the government failed to disclose favorable evidence, and (2) that the evidence it 'suppressed' was material." *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995). The Court subsequently explained that the requirement that the evidence be material requires that the evidence "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972); *see also United States v. Bagley*, 473 U.S. 667,

674-75 (1985) ("A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.") (*quoting United States v. Agurs*, 427 U.S. 97, 104 (1976)). The Court since has held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *see also Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (applying *Bagley* standard); *United States v. Spinelli*, 551 F.3d 159, 164-65 (2d Cir. 2008) (finding "undisclosed information is deemed material so as to justify a retrial only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different") (*quoting Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995)). This materiality standard is not a question of "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

In addition to exculpatory evidence, the *Brady* disclosure requirement also encompasses evidence that could have been used to impeach a witness. *Bagley*, 473 U.S. at 676; *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Payne*, 63 F.3d at 1210. In general, impeachment evidence has been found to be material "where the witness supplied the

only evidence linking the defendant(s) to the crime, . . . or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case." *Payne*, 63 F.3d at 1210 (internal quotations and citations omitted); *see also Avellino*, 136 F.3d at 256. On the other hand, [9] impeachment evidence is not material if the testimony of the witness was corroborated, or when the suppressed evidence "merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Payne*, 63 F.3d at 1210 (internal quotations and citations omitted). Undisclosed impeachment evidence is not material under *Brady* when, "although possibly useful to the defense, it is not likely to have changed the verdict." *Avellino*, 136 F.3d at 257.

The Second Circuit has held that, "'[u]nder *Brady* and its progeny, the government has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense,' and the individual prosecutor will be presumed to have knowledge of all information gathered in connection with the government's investigation. *Payne*, 63 F.3d at 1208 (*citing Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor in each case has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.")). Despite this caution to prosecutors, the Second Circuit in *Avellino* went on to write:

> knowledge on the part of persons employed by a

> different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require [the court] to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis.

136 F.2d at 255 (internal quotations and citations omitted); *see also United States v. Locascio*, 6 F.3d 924, 949-50 (2d Cir. 1993) (refusing to impute knowledge to Assistant United States Attorney prosecuting that action based on reports of FBI agents "uninvolved in the investigation or trial of the defendants-appellants"); *United States v. Quinn*, 445 F.2d 940, 943-44 (2d Cir. 1971) (refusing to impute knowledge of a Florida prosecutor to an Assistant United States Attorney in New York; rejecting as "completely untenable [the] position that knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor"). Moreover, evidence is not considered to have been suppressed under *Brady* "if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence." *Payne*, 63 F.3d at 1208 (internal quotation and citations omitted). Thus, documents that are part of the public records are not deemed suppressed if defense counsel [10] should know of them and fails to obtain them due to a lack of diligence in his own

investigation. *Id.*

Here, the Government contends that it did not violate its disclosure obligations under *Brady* by not turning over the Mouw-Gravano tapes for two reasons: first, because it did not possess or have knowledge of the tapes; and second, because there was nothing in the tapes that carried material exculpatory or impeachment value. With respect to the Government's knowledge, Petitioner alleges, without factual support, that the Mouw-Gravano tapes "were apparently forwarded to prosecutors in the Southern District of New York prior to [Petitioner's] trial in November 2004" and were "apparently withheld." Pet. at 3, 7. The Government counters that neither prosecutors nor FBI agents working on Petitioner's case ever received or possessed the Mouw-Gravano tapes at the time of trial. Honig Aff. ¶ 6. Rather, the only knowledge the Government had was that the Arizona state authorities had investigated and arrested Gravano for drug trafficking. Id. ¶ 3-4. However, the Government does concede that it had the same knowledge of the existence of the tapes as Petitioner had, *i.e.*, from stories in the media. Id. ¶ 6. But for the procedural bar, and the substantive use to which the tapes could have been put, or lack thereof, this concession by the Government would raise significant concern for the Court.

The fly in the ointment is the failure on Petitioner's part to explain how the fact of an allegedly ongoing relationship between Gravano and Mouw could have impeached Mouw's testimony. Gravano did not testify at the trial, and apparently

his only role at the trial was as the target that Petitioner had directed be killed. Evidence of the plot to kill Gravano and Gravano's drug trafficking were affirmatively introduced by the Government, and it is not clear how any of this information would have been grist for impeachment with respect to any of the witnesses who testified. Moreover, although Mouw testified at trial, his testimony went solely to the existence of the charged enterprise, which was corroborated by overwhelming evidence at trial. *See* Opp. at 26-27 (citing transcript excerpts).

Thus, even if Petitioner had demonstrated that the ongoing relationship with Gravano could have been used to impeach Mouw in some way, that evidence was not material and under *Brady* and its progeny not required to be produced. Furthermore, Petitioner conclusorily states that disclosure of the Mouw-Gravano tapes would have enabled him to make educated decisions about whether to call hostile witnesses, but he comes with no facts to support this contention. Once again I find that Petitioner has failed to meet his burden on this prong of the petition and relief must be denied. [11]

2. Claims Regarding Juror 7

Petitioner additionally contends that, following the jury's verdict, Juror Seven approached the Court and attempted to change his vote. Petitioner argues for an evidentiary hearing. Interestingly, neither side produced a transcript of the meeting with the juror, counsel and Judge Casey. Petitioner concedes that Rule 606(b) of the Federal

Rules of Evidence generally proscribes inquiries into jury deliberations. Rule 606(b) is grounded in the common-law rule against admission of juror testimony to impeach a verdict and the exception for juror testimony relating to jury tampering. *Tanner v. United States*, 483 U.S. 107, 121 (1987). The rule Provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed. R. Evid. 606(b); *see also Manley v. Ambase Corp.*, 337 F.3d 237, 251 (2d Cir. 2003) ("Rule 606(b) precludes such an inquiry into the 'mind or emotions' of deliberating jurors."); *United States v. Thomas*, 116 F.3d 606, 620 (2d Cir. 1997) ("The mental processes of a deliberating juror with respect to the merits of the case at hand must remain largely beyond examination and second-guessing, shielded from scrutiny by the court as much as from the eyes and ears of the parties and the public."). A petitioner

may meet an exception to this rule "only if he can make a showing of significant new objective facts which strongly tend to prove that [those facts] tainted one or more of the other jurors." *United States v. Moten*, 582 F.2d 654, 660 (2d Cir. 1978). Petitioner's contention that at the least "an evidentiary hearing should be ordered," Pet. at 13, might carry some weight but for the fact that he has failed to produce a scintilla of evidence that the recantation was the result of jury tampering, nor is there any such allegation in the record. *See Ida v. United States*, 191 F. Supp. 2d 426, 432-33 (S.D.N.Y. 2002) (finding no basis for a hearing on the claim of possible jury tampering when movant had come forward with no evidence of improper contact with the jury). Indeed, according to Petitioner's account of the relevant facts, the Court did inquire into the reason for Juror Seven's attempted recantation in an interview in chambers in the presence of all attorneys. See Pet. at 8. Petitioner has produced no evidence to support his contention that this inquiry was inadequate under the circumstances, and therefore any further evidentiary hearing cannot be justified under Federal Rule of Evidence 606(b).

3. Claims Regarding the Santos Decision

Finally, Gotti moves to vacate his conviction because his previous conviction in the Eastern District of New York, which he claims impacted his conviction and sentence in this Court, was invalidated by the Supreme Court's decision in *United States v. Santos*. The Government argues that

the Court's *Santos* decision does not apply retroactively, and that even if it did have retroactive application, it would not invalidate the Petitioner's conviction or sentence. I share this view and find that the definition of "proceeds" as "profits" in Santos squarely encompasses the payments made to Petitioner that were the basis for his § 1956 conviction for money laundering and conspiracy to launder money. For further discussion on this score, see Judge Block's decision in *Gotti*, 2009 WL 197132 (denying habeas relief from Petitioner's underlying conviction in the Eastern District of New York) and my discussion about the denial of the petition on procedural grounds, *supra* Section III(A)(3).

IV. CONCLUSION

For the foregoing reasons, the petition for a writ of *habeas corpus* is DENIED. A certificate of appealability will not issue because Petitioner has failed to make a substantial showing of the denial of a federal right. *See* 28 U.S.C. § 2253. The Clerk is directed to close this matter and remove it from my docket.

IT IS SO ORDERED
New York, New York
April 15, 2009

*_HAROLD BAER_*
U.S.D.J.

[12]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PETER GOTTI,

Petitioner,

08 Civ. 7178 (HB)

-Against-

OPINION & ORDER

UNITED STATES OF AMERICA,

Respondent.

----------X

Hon. Harold Baer, Jr., District Judge:

In an Opinion and Order dated April 15, 2009 ("April 15 Order"), this Court denied the motion of Petitioner Peter Gotti to vacate his conviction pursuant to 28 U.S.C. § 2255. On April 25, 2009, Petitioner moved for reconsideration of the Court's April 15 Order. The Government filed an opposition to the motion for reconsideration on May 19, 2009; no reply was filed. For the reasons that follow, Petitioner's motion is denied.

I. BACKGROUND

The facts underlying this matter were discussed at length in the April 15 Order, and they will not be repeated here. *See Gotti v. United States*,

No. 08 Civ. 7178 (HB), 2009 WL 1010498, at *1-2 (S.D.N.Y. Apr. 15, 2009). In the April 15 Order, the Court considered voluminous records of Petitioner's criminal proceeding and carefully considered the applicable law in concluding that (1) all of Petitioner's claims were procedurally barred for failure to raise them on his direct appeal of his conviction; (2) the Government's failure to produce recordings of conversations between a former informant and FBI agent did not violate Petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963); (3) Petitioner had failed to show that a hearing on the issue of jury tampering was warranted; and (4) the Supreme Court's decision in *United States v. Santos*, 128 S.Ct. 2020 (2008), defining the term "proceeds" in 18 U.S.C. § 1956 as profits, squarely encompassed the payments made to Petitioner that were the basis of his conviction for money laundering and conspiracy to launder money. Plaintiff filed this motion for reconsideration on April 25, 2009.
[2]

II. DISCUSSION

A. Legal Standard

A motion for reconsideration under Local Rule 6.3 is appropriate only where "the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *In re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003) (internal quotation marks

and citation omitted); *see also Eisemann v. Greene*, 204 F.3d 393, 395 n.2 (2d Cir. 2000). The Rule must be "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court." *DGM Invs., Inc. v. New York Futures Exch., Inc.*, 288 F. Supp. 2d 519, 523 (S.D.N.Y. 2003). The purpose of this restrictive application of the Rules is, among other things, "to ensure the finality of decisions." *Schrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see also In re Health Mgmt. Sys., Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (noting that reconsideration is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources"). "The difficult burden imposed on the moving party has been established 'in order to dissuade repetitive arguments on issues that have already been considered fully by the Court.'" *Perez v. United States*, 378 F. Supp. 2d 150, 154 (E.D.N.Y. 2005) (quoting *Ruiz v. Commissioner of Dep't of Transp.*, 687 F. Supp. 888, 890 (S.D.N.Y.), *aff'd*, 858 F.2d 898 (2d Cir. 1988)). "A motion for reconsideration is not an opportunity for the moving party 'to argue those issues already considered when a party does not like the way the original motion was resolved,'" *Lichtenberg v. Besicorp Group Inc.*, 28 Fed. Appx. 73 (2d Cir. 2002) (quoting *In re Houbigant, Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y. 1996)), nor is it an opportunity for the moving party to "advance new facts, issues or arguments not previously presented to the Court," *Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir. 1991) (citation

omitted). The decision of whether to grant or deny a motion for reconsideration lies within the sound discretion of the district court. *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983); *Citigroup Global Markets Inc. v. VCG Special Opportunities Master Fund Ltd.*, 08-CV-5520 (BSJ), 2009 U.S. Dist. LEXIS 45819, at *3 (S.D.N.Y. June 1, 2009).

B. Analysis

Petitioner's instant motion is essentially a recapitulation of the arguments he put forth in support of his initial petition for *habeas corpus* relief. While Petitioner points out certain fine points of fact that he contends were improvidently stated in the April 15 Order and that he argues "warrant correction," none of these contentions points to any facts that the court actually overlooked in its decision such that reconsideration of the facts could "reasonably be expected to alter the conclusion reached by the court." In re BDC 56 LLC, 330 F.3d at 123. Moreover, Petitioner restates his belief that the Government was in possession of tape recordings that he could have used for exculpatory and/or impeachment purposes at trial and that his constitutional rights were violated because he was denied access to those tapes at trial. In the April 15 Order, the Court rejected Petitioner's Brady arguments for two separate and independent reasons: first, that the claim was procedurally barred; and second, that Petitioner had not borne his burden of showing how the tapes could have been used to impeach any of the trial witnesses, and

therefore failed to show any prejudice. None of Petitioner's arguments on reconsideration convinces me that I overlooked any point of fact or controlling law in reaching those conclusions.[1] If Petitioner wishes to advance arguments that the Court's conclusions were wrong, or that facts or controlling law were misapplied, those arguments may be raised on appeal.

III. CONCLUSION

For the foregoing reasons, Petitioner's motion for reconsideration is DENIED. The Clerk of the Court is instructed to close this case and remove it from my docket.

IT IS SO ORDERED

New York, New York
August 3, 2009

HAROLD BAER
U.S.D.J.

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[1] Petitioner does not challenge any portion of the April 15 Order that denied *habeas* relief based on Petitioner's arguments that there may have been jury tampering or that the Supreme Court's decision in Santos applies retroactively and invalidates his 2003 conviction for money laundering under 18 U.S.C. § 19856 in the Eastern District of New York.

MANDATE

USDC SDNY
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DATE FILED: 27 JAN
2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th Day of January, two thousand ten,

Present:

Robert D. Sack,
Robert Katzmann,
Circuit Judges,
Richard J. Sullivan,*
District Judge.

United States
Court of Appeals
Second Circuit:
Filed JAN 25
2010
Catherine O-
Hagan Wolfe,
Clerk

Peter Gotti,
Petitioner-Appellant,

v.

United States of America,
Respondent-Appellee.

09-3824-pr

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is hereby

ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

FOR THE COURT:
Catherine O-Hagan-Wolfe, Clerk

__Catherine O'Hagan-Wolfe___

United States
Court of
Appeals,
Second Circuit

* Richard J. Sullivan, of the United States District Court for the Southern District of New York, sitting by designation.

A TRUE COPY
Catherine O'Hagan-Wolfe, Clerk
By: ____/S/___
DEPUTY CLERK

ISSUED AS MANDATE:
JAN 25, 2010